

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 4, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-1162-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**BRADFORD J. MAY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Bradford J. May has appealed from a judgment convicting him of one count of burglary as a party to the crime in violation of §§ 939.05 and 943.10(1)(a), STATS., and sentencing him to six years in prison. We affirm the judgment.

May's first contention is that the trial court erroneously exercised its discretion by giving WIS J I—CRIMINAL 173, which instructed the jury that evidence had been presented that the defendant possessed recently stolen property. The instruction further stated that if the jury found that the defendant possessed property which was recently stolen, "you may consider that as circumstantial evidence that the defendant participated in some way in the taking of the property."

A trial court has wide discretion in deciding which jury instructions to give, provided the instructions chosen fully and fairly inform the jury of the law applicable to the particular case. See *Farrell v. John Deere Co.*, 151 Wis.2d 45, 60, 443 N.W.2d 50, 54 (Ct. App. 1989). Whether there were sufficient credible facts to permit the giving of an instruction is a question of law which we review de novo. See *id.*

The evidence at trial amply supported giving this instruction. The evidence indicated that at 1:00 a.m., a Washington County Sheriff's Department officer came upon a car parked halfway off the road near a cemetery with its lights off and its trunk open. The officer observed two figures near the rear of the vehicle and shone his spotlight on them, fully illuminating May. The officer observed May speak to the other man, who then ran off. The officer subsequently observed that a large gas-powered generator was wedged in the trunk, that a string trimmer was leaning against the car, and that two more string trimmers and a battery charger were about thirty feet from the car. A fourth string trimmer, a bolt cutter and a pair of pliers were also in the car.

A storage building belonging to the cemetery association was located about ninety feet away from the car. Officers discovered that the lock to

the building had fresh scratches on it and that the lock cover had been removed. They also discovered that two sections of the siding had been pulled away, leaving an opening just large enough for a person to crawl through. The manager of the cemetery subsequently identified the generator, trimmers and other items observed by the officer as belonging to the cemetery association and testified that other items in the storage building had been moved from where he had left them the night before it was burglarized. The manager also testified that a single person could not lift the generator or move it across the grass, despite its add-on cart and wheels.

May denied knowing the name of the man who fled the scene. He testified that the man was a stranger who had approached him at a bar and asked for a ride to retrieve some tools which he had to leave by the side of the road after having an argument with the person he was in business with. May testified that he borrowed a car so he could help the stranger, but never learned where the man wanted to take the equipment. He denied entering the storage building or taking anything from it.

This evidence clearly permitted a finding that May was in possession of recently stolen property when he was discovered by the police. It also clearly permitted the inference that he knew the property was stolen. Consequently, the trial court was entitled to use WIS J I—CRIMINAL 173, instructing the jury that if it found that May possessed property which was recently stolen, it could consider that finding as circumstantial evidence that he had participated in some way in the taking of the property.

Contrary to May's argument, the instruction in no manner shifted the burden of proof from the State to him. The instruction did not inform the jurors

that May possessed recently stolen property, merely that evidence had been presented which permitted such a finding. The instruction told the jurors simply that *if* they found that May possessed such property, they could, but were not required to, consider that finding as circumstantial evidence that he participated in taking it. The instruction clearly informed the jurors that the weight to be given the evidence of possession was for them to decide and should depend upon the time and place of possession, as well as the other facts of the case. The jury's ultimate finding that May possessed the stolen property as a result of his participation in the burglary was amply supported by the remaining evidence in this case, including the time and place of possession and May's farfetched explanation for his conduct.

May's final argument is that the trial court considered improper and immaterial factors at sentencing when it stated that he committed perjury at trial and considered his refusal to admit his guilt. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *See State v. Rodgers*, 203 Wis.2d 83, 93, 552 N.W.2d 123, 127 (Ct. App. 1996). Appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. *See State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record. *See id.* at 622-23, 350 N.W.2d at 638-39.

The primary factors the trial court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. *See id.* at 623, 350 N.W.2d at 639. Additional relevant considerations include the defendant's past criminal record or history of

undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; his or her remorse and cooperativeness; the need for close rehabilitative control of the defendant; and the rights of the public. *See id.* at 623-24, 350 N.W.2d at 639.

A trial court may not add an additional term for perjury to a convicted defendant's sentence. *See Lange v. State*, 54 Wis.2d 569, 575, 196 N.W.2d 680, 684 (1972). However, the trial court's appraisal of the defendant's attitude, including his or her veracity at trial, is highly relevant to the exercise of sentencing discretion. *See id.*

Contrary to May's contention on appeal, the complete implausibility of his testimony at trial, combined with the remainder of the evidence and the jury's determination that his story was untruthful, provided a basis in the record for the trial court to reasonably conclude that he lied when testifying. However, there is no evidence that the trial court added to May's sentence on the grounds that he committed the uncharged crime of perjury. The trial court sentenced May to six years in prison—four years less than the ten-year maximum for the offense. It considered the credibility of May's testimony as merely one factor in an assessment of his failure throughout his life to take responsibility for his wrongful actions. It characterized his trial testimony as part of a well-established pattern of denying responsibility for his actions and refusing to cooperate or live up to his obligations, whether on probation, juvenile supervision or when testifying. Because the trial court properly concluded that May's lack of truthfulness in testifying was part of a pattern of conduct which was relevant to determining his need for rehabilitation, custodial treatment and incarceration, no basis exists to

conclude that the trial court erroneously exercised its discretion by considering it. *See id.* at 575-76, 196 N.W.2d at 684.

For similar reasons, the trial court properly considered May's refusal to admit his guilt. A trial court may not impose a harsher sentence than it would otherwise impose simply because after being found guilty a defendant refuses to admit guilt. *See Scales v. State*, 64 Wis.2d 485, 495, 219 N.W.2d 286, 292 (1974). However, a defendant's attitude toward the crime, including refusal to admit guilt, may be relevant to the need for rehabilitation and the public's need for protection from the defendant. *See State v. Baldwin*, 101 Wis.2d 441, 459, 304 N.W.2d 742, 751-52 (1981). In this case, as with the credibility of his trial testimony, the trial court considered May's refusal to admit his guilt as part of his continuing pattern of refusing to accept responsibility for his wrongful conduct and to conform to the laws and rules applicable to him. It did not give undue or overwhelming weight to May's refusal to admit guilt to this particular offense, but merely considered it as one factor demonstrating his need for incarceration. As such, no erroneous exercise of its sentencing discretion occurred. *See id.*

In concluding, we also note that when challenging the trial court's sentence May's appellate counsel states that the sentence was contrary to the State's recommendation, implying that the trial court sentenced May more harshly than recommended by the State. In fact, the State recommended a sentence of seven or eight years, and the trial court sentenced May to only six. While counsel acknowledges elsewhere in the body of his brief that the State recommended a seven- to eight-year sentence, the portion of his brief which implies that the State recommended a lesser sentence is misleading and deceptive and will not be countenanced by this court.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.



